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IN THE SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS, PETITIONER

v.

LYNNE UNDERDOWN AND
IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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Pursuant to Rule 15.8 of the Rules of this Court, the Solicitor General, on behalf of the respondents, respectfully submits this supplemental brief.

1. This case involves the constitutionality of the Attorney General's discretionary decision, exercised through her delegate, the Immigration and Naturalization Service (INS), to detain respondent pursuant to 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The Fifth Circuit held that the Attorney General's continued detention, under 8 U.S.C. 1231(a)(6) (Supp. IV 1998), of an alien who is subject to a final order of removal and has been determined by the Attorney General to pose a threat of danger or flight if released, is constitutional. 185 F.3d 279 (2000). That the government may

not be able to immediately effectuate the alien's removal did not alter that result, in the court's view, and the court pointed out that petitioner's detention was not properly characterized as permanent because of the regulatory procedures for automatic, periodic administrative review. Id. at 291. The court also found that it would be premature to conclude that petitioner would never be removed. It concluded that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant." Id. at 294.

2. a. The petition for a writ of certiorari to review the Fifth Circuit's judgment was filed on January 11, 2000, requesting, inter alia, that a ruling on the petition "be deferred for a reasonable period to allow the Ninth Circuit to decide Kim Ho Ma [v. Reno]," and arguing that, if the Ninth Circuit ruled in favor of the alien, a split in the circuits would result warranting this Court's review. Pet. 6. The petition also contended that, regardless of the outcome in Ma, the Court should grant review in the instant case because the court of appeals' decision, in petitioner's view, is incorrect. Pet. 6-28.

On April 17, 2000, petitioner filed a supplemental brief bringing to the Court's attention the Ninth Circuit's April 10, 2000, decision in Ma v. Reno, 208 F.3d 825, explaining that the Ma decision conflicts with the Tenth Circuit's February 29, 2000,

decision in Ho v. Greene, 204 F.3d 1045, and contending that the Ma decision conflicts with the decision in the instant case on constitutional grounds. Pet. Supp. Br. 3-6.

b. The government filed a brief in opposition in this case on May 15, 2000. In that brief, we explained (at 15-16) that the decision of the Tenth Circuit in Ho, which was issued subsequent to the filing of the instant petition, is in accord with the decision below. We also pointed out (at 16) that the result in this case is inconsistent with the result reached by the Ninth Circuit in Ma. We nevertheless opposed review in this case at that time because no court of appeals had reached a contrary result on the constitutional issue, the court of appeals had not addressed (and petitioner did not present to this Court) the statutory argument on which the Ma court relied, and review by the Court of the constitutional issue in this case would be premature in light of the conflicting rulings by the Ninth and Tenth Circuits on the antecedent question of statutory interpretation, which the government had sought to eliminate by filing a petition for rehearing en banc in Ma. Br. in Opp. 16-18.

c. On May 24, 2000, petitioner filed a reply brief, acknowledging (at 3-4) that the statutory issue should be resolved before reaching the constitutional question presented by this petition. Petitioner contended, however, that the statutory issue could be addressed in this case because it is a necessary predicate to the constitutional questions presented.

d. By letter dated June 9, 2000, the Solicitor General informed the Court that the government's petition for rehearing en banc in Ma was denied on June 2, 2000, and that he had expedited consideration of whether to file a petition for a writ of certiorari in that case. He also informed the Court that the alien's petition for rehearing en banc in Ho was denied on June 2, 2000.

By letter dated June 20, 2000, the Solicitor General informed the Court that he had authorized the filing of a petition for a writ of certiorari in Ma, which we had cited in our brief in opposition as conflicting with the result in the instant case. By letter dated June 26, 2000, petitioner asserted that the court of appeals in this case had implicitly ruled on the statutory question on which Ma relied, that it had been raised and briefed by petitioner in a post-argument supplemental brief below, and that, in any event, the Court should grant review in this case because the statutory issue has the same bearing on this case as on Ma.

3. On July 5, 2000, the Solicitor General filed a petition for a writ of certiorari in Ma. Reno v. Ma, No. 00-38. On August 31, 2000, the respondent in that case filed a brief in opposition. Simultaneously with our filing of this supplemental brief, we are filing our reply brief in Ma, urging the Court to grant certiorari in that case as well as this one.

4. We have now concluded -- in light of the denial of rehearing en banc in Ma, the subsequent filing of our certiorari petition in that case, and the respondent's brief in opposition to

that petition -- that the Court should grant certiorari in this case as well as in Ma. In his brief in opposition in Ma, the respondent places central reliance on the argument that the Ninth Circuit's statutory interpretation is supported by the doctrine that statutes should be interpreted in a manner that avoids a serious constitutional question. See 00-38 Br. in Opp. i, 3, 11, 14, 18-19, 26, 31-32. Because the constitutional arguments that the Ma respondent relies upon in defense of the Ninth Circuit's statutory ruling were rejected by the Fifth Circuit in this case, we believe that it would be appropriate for the Court to grant certiorari in this case and in Ma to resolve both the statutory and the constitutional challenges to detention under Section 1231(a)(6) at the same time.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari in this case and in Ma v. Reno, No. 00-38, and consolidate the two cases for oral argument.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 2000